DATE: June 22, 1999

CASE NO.: 1998-OFC-00008

In the Matter of

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR

Plaintiff

v.

GOYA DE PUERTO RICO, INC.

Defendant

Appearances: Nancee Adams-Taylor, Esq.
For Plaintiff

Nelson Robles Díaz, Esq.
José Luis González, Esq.
For Defendant

Before: Robert D. Kaplan
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

The Office of Federal Contract Compliance Programs (OFCCP) filed an administrative complaint against Goya de Puerto Rico (Goya) on May 1, 1998, alleging that Goya violated its obligations as a federal contractor under Executive Order No. 11246[1] (Executive Order), the Vietnam Era Veterans' Readjustment Assistance Act of 1974[2] (VEVRAA), Section 503 of the Rehabilitation Act of 1973[3] (Section 503), and their implementing regulations (41 C.F.R. Parts 60-1 to 60-60, 41 C.F.R. Part 60-250, and 41 C.F.R. Part 60-741, respectively). OFCCP contends that Goya's violations consist of failing to develop and maintain a written affirmative action program (AAP) as required by the Executive Order, VEVRAA and Section 503. OFCCP seeks, *inter alia*, the debarment of Goya as a federal contractor.

On June 10, 1998 the Chief Administrative Law Judge, Office of Administrative Law Judges,

---

[1] 30 Fed. Reg. 12319, as amended by Executive Orders No. 11375 and 12086, 32 Fed. Reg. 14303 and 43 Fed. Reg. 46501, respectively.

[2] Codified as amended at 38 U.S.C. §4212.

[3] Codified as amended at 29 U.S.C. §793.

issued a docketing order. Subsequently, the case was assigned to me to be heard and decided.

On June 29, 1998 Goya filed an answer to the administrative complaint, in which Goya contends that it is not a federal government contractor because it has not signed the government's Blanket Purchase Agreement (BPA) which requires contractors to have an AAP. Goya's answer also states that, "The implementation of an affirmative action plan violates the Civil Rights Act, Title VII, 42 U.S.C.A. 2000e."

Hearing was held before me on February 3 and 4, 1999 in San Juan, Puerto Rico at which time the parties had the opportunity to present evidence and argument. OFCCP presented the testimony of witnesses and documentary evidence. (P 1 - 30)[4] Goya did not offer any evidence at the hearing, although it offered several documents related to its court action discussed below (marked A 1 - 3). However, prior to the hearing Goya had submitted its Exhibits 1 to 11 (now marked as D 1 - 11) to the undersigned and had exchanged these Exhibits with OFCCP. At the hearing Goya stated that it intended to offer D 1 - 11 into evidence, but it did not formally do so. (T 16-17) As Goya clearly intended to offer D 1 - 11 into evidence, and OFCCP was provided these documents and voiced no objection, these Exhibits are herewith received into the record.

OFCCP and Goya submitted post-hearing briefs on May 13 and 14, 1999, respectively. The parties submitted reply briefs on June 4, 1999. I re-opened the hearing on June 10, 1999 in order to obtain OFCCP's clarification of the remedy it seeks, and allowed both parties to file written responses. OFCCP submitted a response on June 11, 1999 in which it amended its prayer for relief by deleting any request for the withholding of payment to Goya. Goya submitted objections on June 14, 1999 in which it asserts that OFCCP now seeks to add remedies related to 41 C.F.R. §§60-250.28 and 60-741.28. However, OFCCP's complaint (in ¶ II and in the prayer for relief) as well as its post-hearing brief (p. 33) make reference to these regulations. Goya's June 14, 1999 objections also oppose, as new, OFCCP's June 11, 1999 request that lifting of debarment should depend on Goya's submission of a complete AAP and satisfying OFCCP that the AAP is accurate and that Goya is in compliance with all pertinent regulations and the Executive Order. However, the essence of this requested remedy is contained in the complaint (in the prayer for relief, paragraph (c)) and this remedy is fully set forth in OFCCP's post-hearing brief (pp. 27, 34). Consequently, Goya's June 14, 1999 objections are without merit, and they are overruled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

---

[4] The following abbreviations are used herein: "P" denotes OFCCP Exhibit; "D" and "A" denote Goya Exhibit; "T" denotes the transcript of the February 3 - 4, 1999 hearing.

OFCCP's March 17, 1999 motion to correct the transcript is herewith granted.

I. Summary of the Evidence; Uncontested Matters

The Executive Order, VEVRAA, and Section 503 (also referred to collectively as the "statutes") and their implementing regulations require that an AAP[5] be prepared and maintained by every contractor who employs at least 50 persons and has a contract of $50,000 or more with the federal government.

Goya is a processor and distributor of foods, located in Bayamón, Puerto Rico, where it has approximately 208 employees. (P 1, 2: ¶¶2, 3, 4; T 126) Goya distributes its products to two commissaries in Puerto Rico, at Ft. Buchanan and Roosevelt Roads, operated by the Defense Commissary Agency (DeCA), a federal agency.[6] (P 1, 2: ¶¶1, 7; T 79) Goya's distribution of goods to the commissaries is under two BPAs issued by DeCA, which have been in effect continuously since 1991. (P 1, 2: ¶¶5-7, 22-26, 27-30; P 5, 5A, 6) The BPA is an "open-ended type of contractual arrangement" used by DeCA where precise future purchase quantities are unknown. (T 71, 73) The first BPA (DECA02 92-A-6417) (P 5), authorizes Goya to deliver goods to Ft. Buchanan. (T 79) The second BPA authorizes deliveries to Roosevelt Roads. (DECA02 92-A-B876) (T 79; P 6) Both BPAs contain the terms and conditions of the transactions. (P 5, P 6; T 71-73, 113) A third BPA (DECA02-92-A-B723) (P 7) was canceled as of September 1997 and rolled into the BPA for Roosevelt Roads. (P 6; T 78-79)

Since 1991, Goya has provided goods to the two commissaries and received payment for the goods substantially in excess of $50,000 annually. (P 1, 2: ¶¶ 10, 15, 20-21, 22-26, 27-30; P 9; P 15, line 9; T 99-101, 310, 326, 333-38, 400-01) For fiscal year (FY) 1993 — October 1, 1992 through September 30, 1993 — DeCA paid Goya $849,684.53. (T 132; P 9, pp.1-3, 9, 13) Subsequently DeCA paid Goya for goods in the following amounts: $948,197.93 in FY 1994; $1,167,825.64 in FY 1995; $1,100,826.23 in FY 1996; $1,086,688.65 in FY 1997; $1,135,703.16 in FY 1998; and $290,866.75 in FY 1999 (October to December 1998). (P 9)

Goya has made no contention that it does not come within the jurisdiction of the statutes based on the number of its employees or the dollar value of its sales to the two commissaries. Therefore, and in light of the facts set forth above, I find that — if Goya has a "Government contract" — the company comes within the jurisdiction of the Executive Order, VEVRAA and Section 503.

---

[5] 41 C.F.R. §60-1.4 requires an "equal opportunity clause"; §60.1-7 requires a Form EEO-1, jointly prepared by the contractor and OFCCP; §60-1.20 requires "affirmative action". For the sake of brevity, these requirements are referred to herein as an AAP. 41 C.F.R. §60-250.5 and 41 C.F.R. §60-741.40 require that the contractor prepare and maintain an "affirmative action program."

[6] Only work in the United States is covered by the statutes, but Puerto Rico is included in the definition of "United States." 41 C.F.R. §§60-1.3, 60-250.2, 60-741.2(f).

Although on June 12 and 14, 1996, Goya provided the government with information regarding its personnel policies (D 1; T 277-78, 295-97), Goya has made no contention that these proffers constitute an AAP as required by the Executive Order, VEVRAA and Section 503. Consequently, and because the documents proffered by Goya to the government contain scanty information relating to affirmative action, I find that Goya has not prepared and maintained an AAP.

II. Controverted Issues

As noted above, Goya's answer to the OFCCP complaint essentially poses two questions with regard to Goya's contention that it is not obligated to have an AAP: Whether Goya has a Government contract, and whether Goya is absolved of its failure to have an AAP because an AAP would violate the Civil Rights Act. Further, in a pre-hearing "Motion for Partial Dismissal" Goya raised the issue of whether Executive Order 11246 violates the United States Constitution. In a telephone conference with the parties on January 27, 1999 I orally denied Goya's motion to dismiss the portion of OFCCP's action founded on the Executive Order, based on my conclusion that an administrative law judge has no authority to rule on the constitutionality of an executive order.

Goya subsequently raised additional issues. On February 2, 1999 — the day before the administrative hearing commenced, Goya filed a complaint against the Secretary of Labor in the United States District Court for the District of Puerto Rico (Civ. No. 99-1111 (PG)), seeking, *inter alia*, a temporary restraining order (TRO) and a permanent injunction against OFCCP's administrative action against Goya in the instant case. In an Opinion and Order issued on February 3, 1999, the District Court denied Goya's request for a TRO. (The Court's slip opinion was provided as Attachment B to OFCCP's post-hearing brief.) The Court noted that Goya had argued that OFCCP's action is improper for the following reasons:

> Goya does not have to follow the administrative procedures laid out throughout various provisions of 41 C.F.R. because the same have been superseded by the Contract Disputes Act of 1978, 41 U.S.C. §601 *et seq*.

The Court further noted that Goya (again) raised issues regarding the constitutionality of the Executive Order. (Also see Goya's Exhibit A, containing its District Court complaint, motion and memorandum of law.) At the hearing, I denied Goya's motion for a stay of the administrative proceeding pending the final determination of the District Court. (T 23-34) It appears that the Court has not yet ruled on Goya's request for a permanent injunction.

At the opening of the hearing on February 3, 1999, Goya (once again) argued that the Executive Order is unconstitutional (T 7), and further explained its position as follows:

> We're not attacking the constitutionality of the two acts [i.e., VEVRAA and Section 503]. We are saying that the implementation of those acts [through] this proceeding is not the proper for[u]m

> because we understand that the applicable law would be the Contract Disputes Act.

(T 8) Finally, in response to my question at the hearing, "[I]f there is a contract between [the] government and Goya, if that is established, then you do have obligations under those two statutes [i.e., VEVRAA and Section 503]?", Goya's counsel stated: "Yes, Your Honor, I understand that that's the case.... Subject to [the] Contract Disputes Act." (T 34-35)

In its briefs, Goya also argues that the Secretary of Labor failed to rule on Goya's August 2, 1996 request for an exemption from any obligation to have an AAP, and that therefore OFCCP's action against Goya is barred at this time. (Goya's post-hearing brief, pp. 18-19; Goya's reply brief, pp. 12-14) OFCCP's reply brief responded to this contention. Consequently, I find that this issue has been fully litigated. Therefore, although Goya failed to raise this matter prior to the conclusion of the hearing, it is a viable issue to be resolved.

Based on the foregoing, the controverted issues are: (1) Whether the administrative proceeding should be stayed pending the final determination of the District Court on Goya's request for a permanent injunction. (2) Whether the OFCCP action against Goya is barred because the Secretary of Labor failed to rule on Goya's request for an exemption. (3) Whether the Executive Order is unconstitutional. (4) Whether an AAP violates the Civil Rights Act. (5) Whether OFCCP's exclusive remedy against Goya is under the Contract Disputes Act. (6) Whether Goya has a contract with the federal government and is therefore required to have an AAP under the Executive Order, VEVRAA and Section 503.[7]

The first question is whether this administrative proceeding should be held in abeyance until the District Court rules on Goya's request for a permanent injunction. As noted, the Court already has rejected Goya's request for a TRO. In doing so, the Court stated that Goya "overestimates its odds of success"in establishing that the Executive Order is unconstitutional. (Slip op. at 3) The Court also stated that "the likelihood of success that said [Executive] order will be stricken down is questionable at best." (Slip op. at 5) In dealing with Goya's need to establish irreparable harm in order to obtain a TRO, the Court pointed out that "Goya cannot be made ineligible to do business with the federal government unless the administrative decision becomes final", and noted that

> Goya is free to appeal whatever decision is taken by the ALJ on the hearing, including any constitutional issues that the ALJ refused to hear for lack of jurisdiction. Eventually, if all the administrative fora refuse to address any constitutional concerns, Goya is free to appeal the matter to the appropriate federal court.

---

[7] Goya's post-hearing brief also posits that its debarment from doing business with DeCA would be harmful to DeCA. (Goya's post-hearing brief, pp. 17-19) Goya has not explained why such a concern constitutes a defense to the OFCCP action. I find that Goya's contention is irrelevant.

(Slip op. at 4-5) In addressing the question of whether administrative remedies should be exhausted before Goya resorts to the federal court system, the District Court stated that "the general norm is that courts will wait until such [administrative] procedures have been fulfilled." (Slip op. at 5, citing Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938)). The District Court also expressed doubt about Goya's argument that the Contract Disputes Act, rather than the administrative procedures contained in 41 C.F.R. Part 60, governs this case. (Slip op. at 5)

In light of the foregoing, I find that Goya has failed to provide any cogent reason why the generally applicable doctrine of exhaustion of administrative remedies should not be applied in the instant case. Indeed, the U.S. District Court rejected Goya's request for a TRO and seems quite prepared to deny Goya's request for a permanent injunction. Consequently, I reject Goya's argument that I should withhold a decision in this case until the District Court issues its ruling regarding Goya's request for a permanent injunction. Therefore, I shall proceed to decide the issues over which I have jurisdiction.

The second question is whether OFCCP's action against Goya is barred because the Secretary of Labor failed to rule on Goya's request for an exemption. On August 2, 1996 Goya sent a letter to DeCA

> to request and obtain an exemption from the applicability of the Affirmative Action Programs clause from our contract.

(D 6) Goya argues that "it is entitled to [a] determination from the Secretary" pursuant to the regulations at 41 C.F.R. §§60-1.5(b), 60-250.3(a)(5)(b), and 60-741.4(b). (Goya's reply brief, pp. 12-14)

OFCCP contends that Goya's request for an exemption was denied in the August 19, 1996 letter from DeCA. (P 10; D 7; OFCCP's reply brief, pp. 1-2) The pertinent portions of the DeCA letter of August 19, 1996 state:

> As to your request for a waiver from the affirmative action requirements under FAR section 22.807,[8] the Director can issue the FAR exemption in only two situations. An exemption must involve a situation where the failure to issue the exemption will either adversely impact national security or a special national interest. Nothing in your letter [of August 2, 1996] demonstrates that either situation exists. ... Without any further justification as to why GOYA cannot comply with the affirmative action plan requirements, I see no basis for DeCA to issue an exemption.

[8] "FAR" denotes the Federal Acquisition Regulations which are incorporated by reference into the BPAs in issue in the instant case.

> If you still wish to submit a request for an exemption, the submission needs to be sent to Patsy [Patricia] Christopher, the [DeCA] contracting officer, for processing. Ms. Christopher's address is ....

In a letter dated August 21, 1996 to Ms. Christopher, chief of the contract division of DeCA, Goya again requested an exemption, stating that the government's business with Goya is beneficial to the government, that it was not possible for Goya to comply with an AAP because "Our population is 99.9% Hispanic", and debarment of Goya would "mean the closing of many businesses in Puerto Rico." (D 8) The record contains a letter dated September 16, 1996 from Goya to Christopher stating that Goya had not received a reply to its request for a "waiver." (D 9) In arguing that the Secretary failed to make a determination regarding its request for an exemption, Goya's reply brief refers to "a memorandum to the ... Department of Labor dated September 23, 1996." (Goya's reply brief, p. 13)

As noted, OFCCP argues that the request for an exemption was denied in DeCA's letter of August 19, 1996. Further, OFCCP correctly states that the Goya "memorandum" of September 23, 1996 is not part of the record and should be disregarded. (Goya submitted this document as an attachment to its reply brief long after the conclusion of the evidentiary hearing.) I agree with OFCCP that the September 23, 1997 memorandum cannot be considered because it is not of record.[9]

I find that in DeCA's letter dated August 19, 1996, the government has provided a final denial of Goya's request for an exemption. This letter denied the request for an exemption and explained that the sole bases for an exemption are that debarment would adversely impact national security or a special national interest. Although in its letter dated August 21, 1996, Goya sought reconsideration of the request for an exemption, it made no contention that national security or a special national interest would be affected, as set forth in DeCA's letter and in the regulations governing waivers or exemptions, 41 C.F.R. §§60-1.5(b)(c), 60-250(b)(3), 60-741.4(b). Rather, Goya argued in its letter only that it was not able to comply with an AAP because, "Our population is 99.9% Hispanic", and that debarment of Goya would "mean the closing of many businesses in Puerto Rico." Under the requirements of the regulations, described in DeCA's letter to Goya of August 19, 1996, this plea constitutes a fatally defective request for reconsideration of the denial of an exemption.[10] Consequently, I find that there was no requirement for the Department of Labor to further rule on Goya's request for an exemption and, therefore, the determination of August 19, 1996 was the final governmental ruling on this subject. Further, Goya has cited no authority for the proposition that the regulations require the Department of Labor to rule on a request for an exemption before taking administrative action against a contractor. And I find no provision in the pertinent regulations that

---

[9] OFCCP also objects to Goya's reliance on its letter dated August 21, 1996, for the same reason. However, I previously received this document (D 8) in evidence. (See p. 2, above.)

[10] Christopher testified: "We basically never received anything that indicated that an exemp-tion was in order." (T 109)

requires such action by the Department. Based on the above, I find that the OFCCP complaint in this case is not barred due to Goya's request for an exemption.

The next three issues — Goya's contentions that OFCCP's administrative action is barred by constitutional considerations and the Civil Rights Act, and that the exclusive remedy lies in the Contract Disputes Act — all relate to my authority to deny OFCCP's complaint on legal or procedural grounds. Goya's constitutional argument is limited to its attack on the validity of the Executive Order. It is clear, however, that an administrative law judge has no authority to rule on the constitutionality of the Executive Order. Stouffer Foods Corporation v. Dole, 1990 WL 58502, at ★1(D.S.C., Jan. 23, 1990), citing Oestereich v. Selective Service System, 393 U.S. 233, 241-242 (concurring opinion) (1968); Bituminous Coal Operators Ass'n., Inc. v. Secretary of the Interior, 547 F.2d 240, 244 (4th Cir. 1977). Consequently, I find that I have no authority to determine that the Executive Order violates the Constitution of the United States. Moreover, even if the Executive Order is unconstitutional, the remedy sought by OFCCP is largely supportable under VEVRAA and Section 503, whose constitutionality is not challenged by Goya.

As noted, in its answer to the OFCCP complaint Goya stated, "The implementation of an affirmative action plan violates the Civil Rights Act, Title VII, 42 U.S.C.A., 2000e." (Answer, "Affirmative Defenses" ¶9) However, Goya has not set forth any basis for its contention: Goya's post-hearing brief merely states the bald assertion that "the Executive Order is 'void' because it violates ... the Civil Rights Act...." (Goya's post-hearing brief, p. 7) Goya's complaint in its District Court action is also conclusory (¶¶ 7.1, 7.2), as is its memorandum to the Court (p. 3). (Exhibits A 1, A 3) Consequently, I find that Goya has abandoned the contention that AAPs required by the statutes are barred by the Civil Rights Act. Diamond v. Chulay, 811 F. Supp. 1321, 1335 (N.D. Ill. 1993) ("A 'skeletal argument,' unsupported by relevant authority or reasoning, is merely an assertion which does not sufficiently raise the issue to merit the court's consideration."), citing United States v. Giovanetti, 919 F.2d 1223, 1230 (7th Cir. 1990) ("A litigant who fails to press a point by supporting it with pertinent authority or by showing why it is a good point despite a lack of authority ... forfeits the point. We will not do his research for him."); United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.") I therefore find that Goya has failed to establish that the AAPs required by the Executive Order, VEVRAA, and Section 503 are barred because they violate the Civil Rights Act.[11]

Next we come to the question of whether OFCCP's exclusive remedy against Goya is under the Contract Disputes Act, 41 U.S.C. §§601 - 613, through the United States Court of Federal Claims. 41 U.S.C. §609(a)(1). The regulations implementing the Executive Order, at 41 C.F.R. §§60-1.1, provide a different procedure for governmental enforcement of the statutes:

> The procedures set forth in the regulations in this part govern all disputes relative to a contractor's compliance with his obligations

[11] The same principles apply to Goya's assertion that the Executive Order is unconstitutional, as Goya has also failed to apply any flesh to that skeletal contention.

> under the equal opportunity clause regardless of whether or not his contract contains a "Disputes" clause.

Although there is no such explicit language in 41 C.F.R. Parts 60-250 and 60-741, it is clear that the same administrative procedures are to be followed in remedying violations under VEVRAA and Section 503, as well as under the Executive Order. 41 C.F.R. §§60-30, 60-250.29(a)(2), 60-741.65; 48 C.F.R. §§52.222-26(c), -35(g), -36(a)(1)(2).

OFCCP argues that an administrative law judge lacks authority to consider whether the Contract Disputes Act "should trump the procedures and fora prescribed by [the Department of Labor's] regulations," citing Stouffer Foods Corp. v. Dole, supra. I agree. As the District Court in Stouffer noted, the Department's administrative law judges "are bound by Executive Order 11246 and its implementing regulations; they have no jurisdiction to pass on their validity." Not only does this conclusion apply to the regulations implementing the Executive Order, but it is applicable to VEVRAA and Section 503, and their implementing regulations. Consequently, I find that I have no authority to overturn the Department's regulations by determining that the Contract Disputes Act provides the exclusive procedure for remedying a federal contractor's violation of the Executive Order, VEVRAA, and Section 503.

Moreover, it appears that the Contract Disputes Act does not "trump" the Department's regulations. Section 605(a) of the Act provides:

> The authority of this subsection shall not extend to a claim or dispute for **penalties or forfeitures** prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle or determine. (Emphasis supplied.)

In my view, the remedies sought by OFCCP (a different federal agency than DeCA) under the statutes and regulations constitute "penalties" and "forfeitures" in that they consist essentially of the debarment of Goya from having government contracts. (See OFCCP's post-hearing brief, pp. 33-34. As noted previously, in its Motion to Amend submitted on June 11, 1999, OFCCP withdrew its request that the remedy for Goya's violations include the withholding of progress payments to Goya.) Consequently, I conclude that the Contract Disputes Act explicitly excludes from its coverage actions such as OFCCP has taken against Goya in the instant case.[12]

---

[12] There is little judicial interpretation of the "penalties or forfeitures" clause. In Shook v. United States, 26 Cl. Ct. 1477 (U.S. Claims Court, 1992), a federal contractor agreed to its debarment but opposed the withholding of payment to it by the Veterans Administration (VA) at the direction of the Department of Labor, under the Davis-Bacon Act, 40 U.S.C.App. §276a-1 to a-5 (1982), and the Contract Work Hours and Safety Standards Act, 40 U.S.C. App. §§327-333 (1982). The Court held that the exemption from the Contract Disputes Act, in §605(a) of the Act, was not applicable to the claim for payment of the withheld funds because

The final issue is whether Goya is a "contractor" with a "Government contract" within the meaning of the regulations implementing the Executive Order, VEVRAA and Section 503 (41 C.F.R. §§60-1.3, 60-250.1, 60-741.2). If so, Goya is, and has been, obligated to comply with the requirements of these statutes to develop and maintain an AAP. As noted, OFCCP contends that since 1991 Goya has been covered by BPAs under which it has provided the two commissaries with goods valued at well over of $50,000 annually. Goya's defense is stated quite simply: "Goya understands that it is not a federal contractor due to the fact that it never executed any kind of BPA with DeCA."[13] (Goya's post-hearing brief, p. 10)

OFCCP has made no contention that Goya executed a BPA. Rather, OFCCP relies on the regulations that provide it is not necessary that a covered contract be in writing: 41 C.F.R. §§ 60-1.4(e), 60-250.23, 60-741.5(e). Goya's response here is that "Ms. Christopher's testimony clearly demonstrated that the BPAs issued to the suppliers place no obligation ... either for the government to order ... or for the supplier to deliver the goods." (Goya's post-hearing brief, p. 11) OFCCP does not take issue with the latter proposition either. Rather, OFCCP contends that where a vendor provides goods to federal facilities in accordance with the terms of a BPA, it agrees to be bound by the BPA and all the obligations which flow from that arrangement.

The elements of a binding contract are: offer, acceptance — i.e., "mutual assent" — and consideration. RESTATEMENT (SECOND) OF CONTRACTS §§17, 22 (1981). It is hornbook law that a contract need not be in writing to be legally binding. And the fact that the offeree need not accept the terms of the proposed bargain does not absolve the offeree of liability under the agreement if the offeree has accepted the terms. Assent or acceptance can be by course of conduct; mutual

---

> the duty to enforce the Davis-Bacon Act violations by withholding monies due under the contract performance remains with the contracting agency, in this case, the VA. Therefore, the act of withholding monies under a contract ... is appealable under the [Contract Disputes Act]. It should not be viewed as a "penalty or forfeiture," to be administered by the DOL.

Shook, 26 Cl. Ct. at 1489-90. If Shook were to constitute the ultimate and determinative ruling under §605(a) where a specific sum is sought it would cause a revolution in the long-standing process by which the Department of Labor seeks to enforce this nation's labor laws. However, in the instant case OFCCP has withdrawn its request that progress payments be withheld from Goya. (Further, there is no evidence that the arrangement between Goya and DeCA provides for such payments.) As Shook involved only the sanction of withholding a sum certain, while the instant case involves only debarment, the Shook opinion provides no guidance with regard to the question of whether debarment of Goya constitutes a "penalty" or "forfeiture" under §605(a).

[13] It appears that Goya actually signed one contract governing its sale of groceries to federal facilities in 1993 and an amendment to that contract in 1995. (P 1: Exhibit A; T 325).

assent can be established where there has been performance by the offeree in a manner invited or required by the offer. RESTATEMENT (SECOND) OF CONTRACTS §§22, 50 (1981).

In light of the foregoing, it is necessary to consider Goya's course of conduct and the relationship between Goya and DeCA, since 1991, with emphasis on whether Goya has been providing goods to the commissaries and been paid for the goods in accordance with the terms of the BPAs.

Ms. Christopher testified that BPAs are open-ended contracts used by DeCA where precise future purchase quantities are unknown. BPAs do not contain prices for the goods nor stated quantities of purchases. (T 71, 73) Christopher testified that BPAs "had been established with Goya when DeCA was started up" in 1991, and they

> establish... the terms and conditions that would apply to any future orders [of food] that would be placed ... by ordering officer personnel at our respective commissaries.

(T 44, 46-47, 49) BPAs include procedures and methods for the government to order goods, for the vendor to supply the goods and to bill for them, and for the government to pay the vendor's bills. (P 5, 5A, 6) In the instant case, the BPAs were provided by DeCA to Goya by mail. (T 75-76, 116-118)

When a commissary ordering officer orders a product from Goya, he places a "four-digit call number with the company." Christopher explained that DeCA sends out "prices quote sheets" each month and that

> the vendor [Goya] then has an opportunity to either submit a change to his prices, or if there are no changes to the prices [previously set by the vendor], the prices in our business system remain based on the last previously quoted price. The price quote sheets are mailed out to all of our nonelectronic pricing companies on a monthly basis.

(T 73-74) Christopher noted that under this arrangement, the government has no obligation to place an order, and "the contractor has no obligation to deliver [any goods]." (T 72-73)

After the commissary's order is filled by Goya, the company submits an invoice to DeCA. DeCA matches the invoice with the receipt for the merchandise based on the "four-digit call number" or "procurement identification instrument number," and DeCA pays the bill. (T 76-77, 84-85) Christopher testified that DeCA considers a BPA "to be a contract once it has been acted upon by the contractor," stating that "the contractor is ... not under any obligation to ship the products, but once they do ship the products then we consider that to be an acceptance of our offer to purchase products ... under the BPA...." (T 91)

Noemi Beltz, a supervisory accounting technician at the Ft. Buchanan commissary, testified that Goya delivers merchandise to Ft. Buchanan at least once a week. (T 125-26) Beltz also testified

that it is not possible for a vendor to deliver goods to the commissary without providing the commissary with a BPA identifying number. This number is printed on the requisition order receipt that the commissary provides to the vendor. (T 139-42)

As noted above, Goya did not put on a factual defense; it has not disputed the evidence which OFCCP has placed in the record. Further, in Goya's "Answer to Secretary's Requests for Admissions" Goya admitted the following critical facts:

- "Defendant has executed contracts or filled blanket purchase agreements with or for the Department of Defense, United States military installations, or DECA commissaries, for at least twenty (20) years." (P 1, 2: ¶8. Also see Goya's admissions at P 1, 2: ¶¶10, 11, 13-30.)

- "Defendant distributes its products to United States military installations pursuant to one or more blanket purchase agreements with the department of defense." (P 1, 2: ¶6. Also see Goya's admissions at P 1, 2: ¶¶5, 7)

Based on the foregoing, it is clear that since 1991 Goya has had knowledge of the terms and conditions of the BPAs, has provided goods to the commissaries in accordance with the BPAs, and has been paid by DeCA for the goods pursuant to the BPAs. This course of conduct by Goya and DeCA establishes offer and acceptance, i.e., their mutual assent to be bound by the BPAs. This, together with mutual consideration (Goya providing goods and DeCA paying for them), constitutes a legally binding contract between DeCA and Goya.

III. Violation and Remedy

Under the Executive Order, VEVRAA, and Section 503, a contractor with a BPA is obligated to develop and implement an AAP, regardless of whether the BPA specifically refers to such an obligation.[14] Moreover, Goya's BPAs refer to the Federal Acquisition Regulations (FAR) which set forth the federal contractor's specific affirmative action obligations: 48 C.F.R. §§52.222-26 (Executive Order), 52.222-35 (VEVRAA), 52.222-36 (Section 503). FAR also incorporates by

[14] As Goya's sales to DeCA have exceeded $50,000 annually, the fact that the value of Goya's individual deliveries of goods under the BPAs are valued at less than $50,000 does not eliminate its obligation to establish an AAP. OFCCP v. Star Machinery Company, 83-OFC-4, (Sec'y Sept. 21, 1983); OFCCP v. Bruce Church, Inc., 87-OFC-7, (Sec'y June 30, 1987).

reference the OFCCP regulations. However, Goya has failed to develop an AAP. Goya's failure to develop an AAP violates the Executive Order, VEVRAA and Section 503.[15]

In remedy, OFCCP seeks debarment of Goya as a federal contractor, including the termination of Goya's existing government contracts, for the longer of a minimum of six months or until Goya submits a complete AAP to OFCCP, and OFCCP has had an opportunity to complete an on-site investigation and a full compliance review and verification of Goya's compliance.

Several types of sanctions are available when contractors fail to comply with the regulations. Pursuant to §209(a)(6) of the Executive Order, the Secretary may

> Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

The Executive Order provides for additional civil sanctions, including cancellation of current contracts and posting of the names of noncomplying contractors. §209(a)(1), (5). The regulations track the Executive Order:

> (a) *General.* The sanctions described in subsections (1), (5), and (6) of section 209(a) of the Order may be exercised only by or with the approval of the Deputy Assistant Secretary. . .
>
> (b) *Debarment.* A contractor may be debarred from receiving future contracts or modifications or extensions of existing contracts, subject to reinstatement pursuant to §60-1.31, for any violation of Executive Order 11246 or the implementing rules, regulations and orders of the Secretary of Labor. Debarment may be imposed for an indefinite term or for a fixed minimum period of at least six months.

41 C.F.R. §60-1.27 (1998); accord 48 C.F.R. §22.809 (enforcement); 41 C.F.R. §§60-250.28(d)(e), 60-741.66(b)(c)(e) (VEVRAA and Section 503).

FAR, 48 C.F.R. §52.222-26(9), contains similar remedy provisions:

---

[15] From June 6 to August 19, 1996, OFCCP engaged in a futile effort to assist Goya to accomplish voluntary compliance with its obligation to develop an AAP. See testimony of Bonnie Ayala, OFCCP compliance officer (T 260-343, 403-06). OFCCP's compliance effort is also described in OFCCP's post-hearing brief, pp. 7-12.

> If the OFCCP determines that the Contractor is not in compliance with this clause or any rule, regulation, or order of the Secretary of Labor, this contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts, under the procedures authorized in Executive Order 11246, as amended. In addition, sanctions may be imposed and remedies invoked against the Contractor as provided in Executive Order 11246, as amended, the rules, regulations, and orders of the Secretary of Labor, or as otherwise provided by law.

Accord 41 C.F.R. §§60-250.28, 60-741.66(e).

Debarment and other "procurement-related sanctions" are proper sanctions for noncompliance with the Executive Order and the affirmative action regulations. See OFCCP v. Rampart Electric, Inc., 89-OFC-14 (Sec'y, Sept. 11,1995). Section 503 provides for debarment of at least six months but no more than three years. 41 C.F.R. § 60-741.66(d). Where the facts are undisputed and the law is clear, immediate debarment is proper. OFCCP v. Disposable Safety Wear Inc., 92-OFC-11 (Sec'y, Sept. 29, 1992).

I find that the sanctions requested by OFCCP in the instant case are appropriate.

ORDER

It is ORDERED that defendant Goya de Puerto Rico, Inc., (Goya) its officers, agents, employees, successors, divisions, subsidiaries, and all persons in active concert or participation with them are permanently enjoined from failing or refusing to comply with the requirements of Executive Order 11246, 38 U.S.C. §4212, Section 503, and the implementing regulations.

It is further ORDERED that:

(1) All Goya's existing government contracts, subcontracts, and blanket purchase agreements, and all of the contracts, subcontracts, and all blanket purchase agreements of Goya's officers, agents, employees, successors, divisions, subsidiaries, and all persons in active concert or participation with it, are herewith canceled and terminated.

(2) Goya is herewith debarred from having or entering into government contracts until the later of the expiration of six months or the fulfillment of the following conditions —

(a) Goya submits a complete affirmative action program to OFCCP;

(b) OFCCP has the opportunity to complete an on-site investigation and to conduct a full compliance review to confirm the accuracy of the affirmative action program and to verify compliance with all regulations; and

(c) The Secretary of Labor, through OFCCP, declares Goya's affirmative action program acceptable.

(3) Goya, its officers, agents, employees, successors, divisions, subsidiaries, and all persons in active concert or participation with Goya are herewith declared ineligible for the award of any future government contracts, subcontracts or blanket purchase agreements, and for the extension or modification of any existing government contract, subcontract or blanket purchase agreement, until section (2)(c) above is met, and until such time as Goya satisfies the Deputy Assistant Secretary for Federal Contract Compliance Programs that it is in compliance with the provisions of Executive Order 11246, Section 503, 38 U.S.C. §4212, and the implementing regulations.

Robert D. Kaplan
Administrative Law Judge

Dated: June 22, 1999
Camden, New Jersey